

**STATE OF INDIANA  
DEPARTMENT OF STATE REVENUE**

**IN REGARDS TO THE MATTER OF:**

**SEVILLE SENIOR CITIZENS CORPORATION  
DOCKET NO. 29-2003-0411**

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND PROPOSED ORDER**

An administrative hearing was held on Wednesday, January 28, 2004 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

At hearing Petitioner's counsel requested time to file briefs. A continuance was granted in order for each side to file legal briefs. Petitioner's brief was received on March 11, 2004. The Department's Brief was received on March 23, 2004.

Petitioner, Seville Senior Citizens Corporation, was represented by Donald H. Dunnuck, of Dunnuck and Associates, 114 South Walnut Street, Muncie, IN 47305. Mr. Dunnuck was assisted by Amanda C. Dunnuck, Attorney at Law. Steve Carpenter appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-5, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Proposed Order.

**REASON FOR HEARING**

On September 29, 2003, the Petitioner's charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of \$11,750. The Petitioner protested in a timely manner.

**FINDINGS OF FACTS**

- 1) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner beginning on August 13, 2003. (Record at 9).
- 2) On August 13, 2003 the Department's investigators went to Petitioner's premises where an allowable bingo event was in progress. (Record at 9).

- 3) The Department's investigators entered Petitioner's building and made contact with Mona Gregory. (Record at 10).
- 4) The president of Petitioner's organization is Mona Gregory. (Record at 69).
- 5) Ms. Gregory escorted the Department's investigators to a game room off of the bingo area. (Record at 10).
- 6) Eighteen (18) video gaming machines were located in a room adjacent to the area used by the Petitioner for bingo. (Record at 10).
- 7) The Department's investigator observed a basket of pulltabs in the room containing the video gaming machines. (Record at 14).
- 8) The Department's investigator observed Ruth Seifert in the room containing the video gaming machines. (Record at 14).
- 9) Ruth Seifert told the Department's investigator that she sold pulltabs to the bingo patrons who enter the room and that she was responsible for paying the winners. (Record at 14).
- 10) Pull tabs were being sold to Petitioner's patron in the "game room." (Record at 14).
- 11) The Department's investigator observed a pull tab game called "Elevens" in the game room. (Record at 14).
- 12) The room containing the video gaming machines was open seven days a week from 4pm to 9pm including the times when the Petitioner was conducting charity gaming. (Record at 15).
- 13) An open and unlocked door separated the Petitioner's location from the adjacent room containing the video gaming machines. (Petitioner's Exhibit 73).
- 14) Petitioner stated that the door was open to allow the patrons in the gaming room access to the restrooms. (Record at 73).
- 15) The room containing the video gaming machines had a door which leads to a hallway at the end of which was a common area containing the restrooms. (Petitioner's Exhibit #8).
- 16) Petitioner had "No Tipping" signs posted in the area where the bingo games were conducted. (Record at 17).
- 17) "No Tipping" signs were not posted in the room containing the video gaming machines. (Record at 17).
- 18) Petitioner's charity gaming license was not posted. (Record at 18).
- 19) According to the Department's investigator, Ms. Seifert was not listed as a worker or operator on Petitioner's charity gaming license application. (Record at 19).
- 20) Petitioner's financial records show a sixteen thousand dollar (\$16,000) donation. (Record at 21).
- 21) Mona Gregory and Bob Teeters, the alleged owner of the video gaming machines, split the money collected from the machines. (Record at 34).
- 22) Mona Gregory was asked by Petitioner's counsel during direct examination, "Okay, and do you have an agreement with Mr. Teeters concerning monies paid to you?" She responded under oath, "Yes." Petitioner's counsel then asked, "And tell the Hearing Officer what that agreement is." Ms. Gregory still under oath replied, "I volunteered back there and then whatever the

machines made Mr. Teeters would donate that to my senior citizens.” (Record at 71-72).

- 23) During questioning by the administrative law judge Mona Gregory stated, “I volunteered for Mr. Teeters and in return he donated to the Seville Senior Citizens half of whatever the gameroom made and then I took it as a donation.” (Record at 88).
- 24) Mona Gregory stated under oath that she informed the Department of two additional workers. These individuals were Michelle Burton and Ruth Seifert. (Record at 80).
- 25) Mona Gregory stated that she did not give Mr. Teeters a receipt for his tax records regarding the sixteen thousand dollar (\$16,000) donation. (Record at 88).
- 26) Mona Gregory is listed as an operator on Petitioner’s license. (Record at 92).
- 27) Petitioner sought to prove that the video gaming machines were a game of skill.
- 28) Petitioner hired a private investigator, to conduct an experiment on one of the machines at issue, in order to prove that it is a game of skill and not chance. (Record at 64).
- 29) The video gaming machines at issue are called Cherry Masters.
- 30) Cherry Master is a coin-operated video machine in which the player inserts money and presses a button. The video screen displays images that rotate in separate independent vertical lines, slow, and then stop. If a combination of images matches horizontally, vertically, or, in some cases, diagonally, the operator will receive credits. The Cherry Master also has a "stop" button that permit the player to control the length of time the images rotate before stopping. (Record at 62-63 and Petitioner’s Exhibit #1).
- 31) The machines at issue display odds of winning. (Petitioner’s Exhibit #2).
- 32) Petitioner’s private investigator manipulated the inner workings of the machine in order to conduct his experiment. (Record at 65-66).
- 33) Petitioner’s private investigator failed to use a control in his experiment. (Record at 66).
- 34) Petitioner’s private investigator was not familiar with the concept of a RNG or random number generator, nor did he know anything about how the machines work. (Record at 67).
- 35) The lack of knowledge on the part of Petitioner’s private investigator and his inability to conduct a proper experiment made his claims and the results of his experiment mere speculation at best.
- 36) The machines at issue do not constitute a game of skill.
- 37) On September 29, 2003, the Petitioner’s charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of \$11,750.

### **STATEMENT OF LAW**

- 1) Pursuant to 45 IAC 18-8-4, the burden of proving that the Department’s findings are incorrect rests with the individual or organization against

which the department's findings are made. The department's investigation establishes a prima facie presumption of the validity of the department's findings.

- 2) The Department's administrative hearings are conducted pursuant to IC § 4-21.5 et seq. (See, IC 4-32-8-5).
- 3) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in conformity with any prehearing order and in an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts..."
- 4) IC 4-21.5-2-26(a) states, "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exemption to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence."
- 5) "[B]ecause Pendelton's interest in his insurance license was a property interest...a preponderance of the evidence would have been sufficient." Pendelton v. McCarty, 747 N.E. 2d 56, 65 (Ind. App. 2001).
- 6) "It is reasonable...to adopt a preponderance of the evidence standard...." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind.App. 1993).
- 7) 45 IAC 18-1-18 states, "'Conduct prejudicial to the public confidence in the department,' as used in this article and in IC 4-32-1 means **conduct that gives the appearance of impropriety**, including the failure to file tax returns, conducting a gaming event without a license, sports betting, **operating a gambling device**, using or possessing a computer or other technologic aid, as defined in section 16 of this rule, or any other activity illegal under IC 35-45-5-1 et seq." (Emphasis added).
- 8) 45 IAC 18-2-4 states in pertinent part, "A readable photocopy of a license is required to be prominently displayed at the facility where the event is being held. The original license must be available for inspection upon the request at all times. In addition to the photocopy, a legible sign of adequate dimension must be prominently posted during an event giving the name of the qualified organization, license number, and the expiration date of the license..."
- 9) 45 IAC 18-3-2(i) provides in pertinent part, "A legible sign of adequate dimension must be prominently posted during an event stating that the operator and workers are not allowed to accept tips."
- 10) Pursuant to IC 4-32-6-24, "'Worker" means an individual who helps or participates in any manner in preparing for, conducting, assisting in conducting, cleaning up after, or taking any other action in connection with an allowable event under this article."
- 11) IC 4-32-7-4 provides, "The department has the sole authority to license entities under this article to sell, distribute, or manufacture the following:
  - (1) Bingo cards.
  - (2) Bingo boards.
  - (3) Bingo sheets.

- (4) Bingo pads.
  - (5) Any other supplies, devices, or equipment designed to be used in playing bingo designated by rule of the department.
  - (6) Pull tabs.
  - (7) Punchboards.
  - (8) Tip boards.
  - (b) Qualified organizations must obtain the materials described in subsection (a) only from an entity licensed by the department.
  - (c) The department may not limit the number of qualified entities licensed under subsection (a).
- 12) IC 4-32-9-4 states, "(a) Each organization applying for a bingo license, special bingo license, charity game night license, raffle license, door prize drawing license, or festival license must submit to the department a written application on a form prescribed by the department.
- (b) The application must include the information that the department requires, including the following:
    - (1) The name and address of the organization.
    - (2) The names and addresses of the officers of the organization.
    - (3) The type of event the organization proposes to conduct.
    - (4) The location at which the organization will conduct the bingo event, charity game night, raffle event, door prize event, or festival.
    - (5) The dates and times for the proposed bingo event or events, charity game night, raffle event, door prize event, or festival.
    - (6) Sufficient facts relating to the organization or the organization's incorporation or founding to enable the department to determine whether the organization is a qualified organization.
    - (7) The name of each proposed operator and sufficient facts relating to the proposed operator to enable the department to determine whether the proposed operator is qualified to serve as an operator.
    - (8) A sworn statement signed by the presiding officer and secretary of the organization attesting to the eligibility of the organization for a license, including the nonprofit character of the organization.
    - (9) Any other information considered necessary by the department."
- 13) IC 4-32-9-16.5 provides in pertinent part, "A qualified organization that receives **ninety percent (90%) or more of the organization's total gross receipts from any events licensed under this article** is required to donate sixty percent (60%) of its gross charitable gaming receipts less prize payout to another qualified organization that is not an affiliate, a parent, or a subsidiary organization of the qualified organization." (Emphasis added).
- 14) IC 35-45-5-1 states, "... "Gambling device" means:
- (1) **a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;**
  - (2) **a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each**

**operation:**

(3) a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling;

(4) a policy ticket or wheel; or

(5) a subassembly or essential part designed or intended for use in connection with such a device, mechanism, furniture, fixture, construction, or installation.

In the application of this definition, an immediate and unrecorded right to replay mechanically conferred on players of pinball machines and similar amusement devices is presumed to be without value..." (Emphasis added).

- 15) IC 35-45-5-3 provides that, "A person who knowingly or intentionally:

(1) engages in pool-selling;

(2) engages in bookmaking;

(3) maintains, in a place accessible to the public, slot machines, one-ball machines **or variants thereof**, pinball machines **that award anything other than an immediate and unrecorded right of replay**, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;

(4) conducts lotteries, gift enterprises, or policy or numbers games, or sells chances therein;

(5) conducts any banking or percentage games played with cards, dice, or counters, or accepts any fixed share of the stakes therein; or

(6) accepts, or offers to accept, for profit, money or other property risked in gambling; commits professional gambling, a Class D felony." (Emphasis added).

- 16) "'Gambling device' is defined as 'a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance,' as well as 'a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation.'" 2001 Op. Att'y Gen 9 (2002).

- 17) The court in Maillard held that because the quarter slide machine did not always return the same value or property for the same consideration upon each operation, the machine was "a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance," therefore, it was found to be a gambling device prohibited by statute. State v. Maillard, 695 N.E.2d 637, 641 (Ind. Ct. App. 1998), transfer denied by Cain v. Maillard, 706 N.E.2d 173 (Ind. 1998).

- 18) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend... an individual ...for any of the following: (1) Violation of a provision of this article or of a rule of the department..."

- 19) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:

(1) Suspend or revoke the license.

(2) Lengthen a period of suspension of the license.

- (3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
- (4) Impose an additional civil penalty of not more than one hundred dollars (\$100) for each day the civil penalty goes unpaid.

### **CONCLUSIONS OF LAW**

- 1) A common misconception is that the conduct of gaming by an exempt organization is a charitable activity. There is nothing inherently charitable about gaming. The conduct of gaming is no different than any other trade or business carried on for profit. The fact that an organization may use the proceeds from its gaming to pay for the expenses associated with the conduct of its charitable programs will not make the gaming a charitable activity.
- 2) Petitioner had “No Tipping” signs posted in the area where the bingo games were conducted. Petitioner did not violate the provision of 45 IAC 18-3-2.
- 3) The Petitioner failed to have a readable photocopy of its license prominently displayed. In addition to the photocopy, a legible sign of adequate dimension must be prominently posted during an event giving the name of the qualified organization, license number, and the expiration date of the license. This constitutes a violation of 45 IAC 18-2-4.
- 4) The eighteen (18) Cherry Master video gaming machines are gambling devices as defined in IC 35-45-5-1.
- 5) Petitioner’s president, who was listed as an operator, and at least one of its workers admitted to working in the room containing the video gaming machines and where pull tabs were sold illegally. Petitioner’s president admitted to accepting money, on behalf of the charity, from the illegal video gaming machines. Petitioner also allowed its patrons free and unfettered access to the illegal video gaming machines. These activities constitute conduct prejudicial to the public confidence in the department. This constitutes a violation of 45 IAC 18-1-18.
- 6) In order for IC 4-32-9-16.5 to apply to a qualified organization it must first receive ninety percent (90%) or more its total gross receipts from any events licensed under this article. That means in computing the total gross receipts of a qualified organization only those amounts from events licensed by the department are included. However, money received by an organization from illegal gaming activities is subject to taxation at the state and federal level, will jeopardize its federal and state exemption status and is also evidence of criminal activity.
- 7) Petitioner did not violate the provisions of IC 4-32-9-16.5.
- 8) Petitioner’s serious violations were sufficient to warrant a three (3) year suspension of its charity gaming license.

- 9) The Department is hereby ordered to adjust the civil penalties in accordance with the above findings.

### **PROPOSED ORDER**

Following due consideration of the entire record, the Administrative Law Judge orders the following:

The Petitioner's appeal is sustained in part and denied in part. Petitioner had "No Tipping" signs posted in the area where the bingo games were conducted. The Petitioner failed to have a readable photocopy of its license prominently displayed. This constitutes a violation of 45 IAC 18-2-4. The eighteen (18) Cherry Master video gaming machines are gambling devices as defined in IC 35-45-5-1. Petitioner's president and at least one of its workers admitted to working in the room containing the video gaming machines and where pull tabs were sold illegally. Petitioner's president admitted to accepting money, on behalf of the charity, from the illegal video gaming machines. Petitioner also allowed its patrons free and unfettered access to the illegal video gaming machines. These activities constitute conduct prejudicial to the public confidence in the department. This constitutes a violation of 45 IAC 18-1-18. Petitioner did not violate the provisions of IC 4-32-9-16.5. Petitioner's serious violations were sufficient to warrant a three (3) year suspension of its charity gaming license

- 1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
- 2) Judicial review of a final order may be sought under IC 4-21.5-5.

**THIS PROPOSED ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Bruce R. Kolb / Administrative Law Judge